FILED
JAN 17 2008
OFFICE OF THE CLERK
SUPREME COURT

No. 07-640

In The
Supreme Court of the United States

PHILIP BERQUIST,
Petitioner,

v.

WASHINGTON MUTUAL BANK,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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January 17, 2008

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REPLY TO BRIEF IN OPPOSITION

Petitioner Philip Berquist respectfully submits the following Reply to Respondent's Brief in Opposition to Berquist's Petition for Certiorari.

I. Berquist Has Not Waived any Issue Concerning his Termination or Reduction in Force grounds.

Respondent's echo (p. 17) of the Fifth Circuit's assertion that Berquist did "not appeal the district court's holding on his claim of reduction in force based on unlawful age discrimination" (Opinion, p. 4, Appendix, p. 5a-6a) is contrary to the record, which reflects that Berquist appealed the District Court's entry of summary judgment against him.

More importantly, this statement by the court below reflects its literalistic and formulaic application of the *prima facie* standard. Rather than analyzing the evidence put forth by the parties below and determining whether Berquist could show that his employment ended because of his age, the court below literalistically analyzed the *prima facie* case and went so far so far as to break Berquist's lawsuit into two supposedly distinct claims (RIF and termination).

Furthermore, the "waiver" argument illustrates the other central problem Petitioner presents to this Court: that the Court of Appeals required Berquist in his *prima facie* case (as opposed to the final stage of the *McDonnell Douglas* analysis) to refute the Bank's purported legitimate non-discriminatory reasons for his discharge – whether it be called a RIF, a lay off, a

closing of one office and transfer of job functions to another office, or a termination.

In this case, Berquist sued Washington Mutual claiming that his termination was based on age. R. 162, 171 (Third Amended Complaint). Berquist did not allege two claims -- one a termination based on a RIF, and the other a wrongful termination claim; rather, his complaint states one claim of age discrimination. While he noted that "Defendant classified Plaintiff's termination of employment as a lay off," R. 170, his claim was that age was a causal factor in his termination in violation of the ADEA. R. 171-72. Moreover, Berquist disagreed that he was genuinely laid off. *See* Appellant's Brief, p.41-42.

In response to a claim of age discrimination, it is the Defendant's burden to articulate a legitimate non-discriminatory reason for its actions. Thus, although it was Washington Mutual's burden to state a legitimate reason for Berquist's termination, the District Court stated that "[i]t is unclear whether *Berquist* is claiming that WAMU discriminated against him by eliminating his position (a wrongful termination claim) or by failing to find another position for him (a reduction in force claim)." R. 1039 (emphasis added). Accordingly, the district court analyzed the termination decision under both theories and concluded (incorrectly) that the Bank was entitled to summary judgment under either theory because Berquist could not show he was qualified for his current job or another position. R. 1039 - 1042.

Berquist appealed. R. 1065. Nowhere does Berquist's notice of appeal state that it was only an

appeal of only part of the District Court's decision. R. 1065. Because the District Court's award of summary judgment to the Bank was based on its erroneous conclusion that Berquist could not show he was qualified, the parties' briefs naturally focused on that issue. However, in his brief, Berquist challenged his termination and argued that his evidence showed that the Bank's purported rationale -- that he was laid off in a reorganization -- was false. Appellant's Brief at 41. Moreover, in support of the fourth prong of the *prima facie* case, Berquist stated that he was let go in favor of younger employees who were retained and ultimately transferred. Appellant's Brief at 38-39. Thus, he did not "waive" any argument that his termination occurred in the context of a reduction in force. The fact that Berquist complained about his "termination"[1] to the Court of Appeals cannot be construed as failure to challenge his termination under a RIF theory -- to the contrary, Berquist was challenging his termination, whatever the Bank's rationale for it.

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[1] *See, e.g.*, Appellant's Brief, p. 41; Reply Brief, p. 3 (distinguishing a termination case from a hiring or promotion case). Moreover, Berquist argued to the court below that the Bank's offer to relocate the two younger employees while refusing relocation to Berquist was evidence of age discrimination. *See* Reply Brief, p. 14.

II. Respondent's Argument Confirms the Confusion Among the Courts as to the Purpose and Requirements of the *Prima Facie* case, particularly where a Plaintiff does not show replacement.

The Fifth Circuit's holding makes clear that Berquist was required to demonstrate, at the *prima facie* stage, a degree of proof high enough to support a judgment in his favor;

> Based on this evidence, a reasonable trier of fact could not determine that Washington Mutual otherwise discharged Berquist based on his age.

Appendix 23a. Strangely, rather than point out that this is an isolated opinion, Respondent refers to other Courts that are in agreement with the Fifth Circuit's ruling in this regard. This argument only confirms that significant confusion exists as to the plaintiff's burden at the *prima facie* stage.

The confusion likely stems, as this Court stated in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515, because of the tendency of courts to "dissect the sentences of the United States Reports as though they were the United States Code." *Id. Hicks*, however, explained that despite any possible confusion caused by dicta in the Court's previous opinions,

> Quite obviously, however, what is required to establish in the *McDonald Douglas prima facie* case is incontestably less than what a directed verdict demands.

Id. In fact, the majority in *Hicks* explained that nothing in the [illegible] allows courts to substitute the required finding that the employer's action was a product of unlawful discrimination for the "much different (and much lesser) finding that the employer's explanation of its action was not believable." *Id.* at 514-515. The court then noted that the "dissent's position amounts to precisely this, *unless* what is required to establish the *McDonald Douglas prima facie* case is a degree of proof so high that it would, in absence of rebuttal, require directed verdict for the plaintiff." *Id.*

Logically, of course, based upon this Court's prior holdings, it would make no sense to require that the plaintiff meet a level of proof sufficient to sustain a judgment at the *prima facie* stage. First, it would require the plaintiff to prove discrimination twice, once at the *prima facie* stage and secondly at the pretext stage (where the plaintiff again has to demonstrate that the adverse employment action is not because of the defendant's articulated reasons, but because of discrimination). Second, if such a high level of proof were required at the *prima facie* stage, it would sound strikingly similar to the level of proof required to constitute "direct evidence" under *Pricewaterhouse v. Hopkins*, 490 U.S. 228 (1989). In that case, it was noted that direct evidence "permitted a reasonable fact finder to conclude that 'absent further explanation, the employer's discriminatory motivation 'caused' the employment decision.'" *Id.* at 265 (O'Conner, J., concurring in judgment). Furthermore, it is hard to imagine this level of proof being required at the *prima facie* stage, when the *prima facie* case is defeated by the defendant's mere articulation of its reasons. *See*

Hicks, 509 U.S. at 510-511. This is particularly so since the defendant's articulation involves no credibility assessment whatsoever. *Id.* at 509.

The Court explained in *Hicks* that the inference created by the *prima facie* case is a mere legal presumption that its purpose is to require the defendants to articulate a legitimate explanation for its actions. *Id.* at 506-511. As this Court made clear in *Hicks*, it is not the probative force of the *prima facie* case that requires the defendant to articulate an explanation for its actions, but rather the legal "presumption" that is created under *McDonald Douglas*. *Id.* at 506-507.

Therefore, Respondent's assertions, which are based on the Fifth Circuit's opinion, demonstrates the rampant confusion among the lower courts on this issue. Thus, this case presents the Court with this question: What is the burden a plaintiff must meet in order for an employer to have to respond with a legitimate, non-discriminatory reason for its action, and how does this burden differ from the ultimate burden of proof of discrimination? This question is even more important at the summary judgment stage, where courts are evaluating the evidence produced by the parties in determining whether material questions of fact exist for trial. Put simply, as noted by Respondent, the Fifth Circuit (and others) requires the employee to prove, by a preponderance of evidence, a case of discrimination at the *prima facie* stage.

Moreover, if the Court of Appeals had in fact employed and correctly applied the standard put forth by Respondent (who claims that the Court of Appeals

was only ensuring that "any evidence creating an inference of discriminatory intent" will suffice, Brief in Opposition at 28), Petitioner would have no complaint on that point, for the outcome would have been different. Certainly the *prima facie* standard stated by the Court below has been used in other cases -- but the Court below did not simply require Berquist to show "any evidence creating an inference of discriminatory intent," rather, the Court below weighed the evidence and concluded that "a reasonable trier of facts could not determine that Washington Mutual otherwise discharged Berquist based on his age." Appendix 23a. Thus the Court below required Berquist to meet his ultimate burden at the *prima facie* stage -- and the Bank states that all the Circuits are in accord that this is an appropriate application of the *prima facie* burden.

Respondent's argument is irreconcilable with *Reeves* as well as with lower Court's decisions such as *Oxman*,[2] *Ercegovitch*,[3] and *Marzano*[4] – which recognize that treatment different from a similarly situated employee who is younger or of a different race or sex will suffice for the *prima facie* case. Berquist showed that when the Bank terminated his employment, he was let go while younger employees (who undisputedly had been performing the same job assignments as had Berquist) were retained and ultimately allowed to

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[2] *Oxman v. WLS-TV*, 846 F.2d 448 (7th Cir. 1988).

[3] *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6th Cir. 1988).

[4] *Marzano v. Computer Science Corp.*, 91 F.3d 497 (3d Cir. 1996).

transfer to other jobs. This evidence would have sufficed under the authorities that Respondent attempts to distinguish.

Moreover, in criticizing *Oxman v. WLS-TV*, 846 F.2d 448 (7th Cir. 1988), Respondent makes the unjustified conclusion that unless a showing of discriminatory intent is part of the *prima facie* case, a plaintiff could "prevail on a claim of intentional discrimination without ever adducing any evidence of [discriminatory intent]." Brief in Opposition, p. 21-22. It is also significant that the very case that Respondent states impliedly repudiated *Oxman* (Brief in Opposition, p. 22) actually cited *Oxman* favorably. *See Leffel v. Valley Financial Services*, 113 F.3d 787, 793 (7th Cir.) *cert. denied*, 522 U.S. 968 (1997) (citing *Oxman* and other authority for the proposition that "that in the context of a reduction-in-force suit, the plaintiff would have to establish as the final element of his prima *facie case* that employees not in the class of persons protected by the ADA were treated more favorably than he").

Finally, Respondent's reliance on *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 643-44 (5th Cir. 1985) (Brief in Opposition at 20, n. 7, 25) is similarly unhelpful to its position. The difficulty here is that the Court below did not utilize the *Thornbrough* approach. Had it looked to whether Berquist had produced "any type of circumstantial evidence that younger employees were more favorably treated than older employees," *id.*, the court below would have reached the opposite conclusion – that Berquist established a *prima facie* case because he was terminated while younger employees were retained

and ultimately afforded the opportunity to transfer to other positions. Rather than showing uniformity in the case law, the Bank has only shown inconsistency.

Because there is a vast variance among the courts below -- sometimes even within the same circuit -- as to the type of evidence sufficient to show a *prima facie* case, particularly where the plaintiff has not been replaced (such as frequently may be the case in a reduction in force) and the burden required to establish it, this Court should grant the petition for certiorari.

III. "Nearly Identical" is not the Same as Similar "in all Relevant Respects."

Respondent urges that the Fifth Circuit did not mean what it said and that its "nearly identical circumstances" standard is not materially different from a "similar in all relevant respects" standard. The opinion, however, speaks for itself and "nearly identical" is not the same as "similarly situated in all relevant respects." Respondent did not even address the issue of employing this heightened standard at the *prima facie* stage as opposed to the ultimate issue of discrimination.

Moreover, the opinion of the court below is internally inconsistent. While finding Berquist not similarly situated to Plaisance and Zapotek for purposes of his ADEA claim, the court below was quick to conclude that the Bank did rehire "other similarly situated employees willing to follow procedures," presumably referring to employees who had accepted the Bank's severance package (which required signing

a release). How such employees are "similarly situated" to Berquist while Plaisance and Zapotek were not is unclear.

Finally, Respondent's suggestion (p. 32) that Petitioner misled this Court as to the ruling in *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6th Cir. 1998) is false. While the court in *Ercegovich* did quote favorably another case using "nearly identical" in all "relevant aspects" language,[5] the emphasis of the court in *Ercegovitch* was that courts must consider all *relevant* circumstances in determining whether co-workers are sufficiently similar. Significantly, the court in *Ercegovitch* reversed the district court's determination that the plaintiff was not similarly situated to younger co-workers in different positions who, unlike the plaintiff, were allowed the opportunity to transfer instead of being terminated:

> We believe that when an employer makes selective offers of transfer following a reduction

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[5] *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796 (6th Cir.1994). In *Ercegovitch*, the court stated that in *Pierce*, the court explained that the plaintiff was simply "required to prove that all of the *relevant* aspects of his employment situation were 'nearly identical' to those of [the non-minority's] employment situation." *Id.* at 352 (citing *Pierce*, 40 F.3d at 802 (emphasis added)); *see also Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir.1997) (citing *Mitchell* in support of the proposition that "[t]o make a comparison of the plaintiff's treatment to that of non-minority employees, the plaintiff must show that he and the employees are similarly situated in all *relevant* respects" (emphasis added)).

> in force or a reorganization, differences in the job activities previously performed by transferred and non-transferred employees do not automatically constitute a meaningful distinction that explains the employer's differential treatment of the two employees. Common sense suggests that when an employer harboring age-discriminatory animus eliminates several employees' positions, its decision to transfer its younger workers to new positions while denying its older workers the same opportunity irrespective of past differences in their particular job functions may reflect proscribed age bias. Because the positions previously held by Ercegovich, Evert, and Cohn were all related human resources positions that were all eliminated pursuant to a general reorganization of the department of Human Resources Development at Goodyear's Akron location, we conclude that Ercegovich was sufficiently similarly-situated to Evert and Cohn to satisfy the fourth component of Ercegovich's *prima facie* case.

Ercegovich, 154 F.3d at 353. This reasoning is the opposite of that employed by the court below. Under *Ercegovitch*, Berquist is similarly situated to Plaisance and Zapotek.

IV. The Court of Appeals' Opinion speaks for itself.

Respondent argues that the Court of Appeals' opinion (which Berquist reads as suggesting that if only Berquist had "followed procedures" by signing a

release, he too, like Yancis, could have been rehired) is not reasonably susceptible to such a "nefarious" construction.[6] This is untrue. Respondent has offered no other plausible meaning of or explanation for the court's language. Further, Respondent has recognized the implication of the court's language, which is insidious. There is no basis in the law for any suggestion that an employee should waive and release his or her rights in order to persuade his employer to treat him more favorably.

Where a lower court "has so far departed from the accepted and usual course of judicial proceedings," an exercise of this Court's supervisory powers is appropriate. U. S. Supreme Court Rule 10(a). Here, whether deliberate or unintentional, the suggestion that if only an employee had "followed procedures" by signing a release, he could have been rehired, warrants correction by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

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[6] Respondent also states that the court's statement is purely factual (as opposed to a legal holding) and thus suggests, without support, that it may be excused on those grounds.

Respectfully submitted,

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